

NOV 17 2005

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARTIN LOPEZ-DIAZ,

Defendant - Appellant.

No. 04-10599

D.C. No. CR-F-03-05285-AWI

MEMORANDUM^{*}

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Submitted November 15, 2005^{**}
San Francisco, California

Before: O'SCANNLAIN, THOMAS, and TALLMAN, Circuit Judges.

Martin Lopez-Diaz appeals his conviction for being a deported alien found in the United States without permission in violation of 8 U.S.C. § 1326. We affirm

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

his conviction. Because the parties are familiar with the factual and procedural history of this case, we will not recount it here.

I

Lopez-Diaz contends that his underlying deportation, effected under the procedures for the expedited removal of aliens convicted of aggravated felonies outlined in 8 C.F.R. § 238.1, violated his right to due process because he did not appear before an immigration judge. To succeed on a collateral attack of the deportation proceeding underlying a § 1326 charge, the defendant must show that “(1) his due process rights were violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice as a result of the defects.” *United States v. Garcia-Martinez*, 228 F.3d 956, 960 (9th Cir. 2000) (quoting *United States v. Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir. 1998)).

We need not examine whether Lopez-Diaz’s due process rights were violated, because he cannot show that he suffered any prejudice. Because Lopez-Diaz was deported through the expedited removal process for aliens convicted of an aggravated felony, he was not “eligible for any relief from removal that the Attorney General may grant in the Attorney General’s discretion.” 8 U.S.C. § 1228(b)(5). Therefore, he cannot “demonstrate plausible grounds for relief from deportation,” and is not entitled to relief. *Garcia-Martinez*, 228 F.3d at 963.

II

The district court sentenced Lopez-Diaz before the United States Supreme Court held that the Sentencing Guidelines were advisory in *United States v. Booker*, __ U.S. __, 125 S. Ct. 738, 764 (2005). Both parties agree that, under the circumstances presented by this case, a limited remand is warranted pursuant to *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc).

CONVICTION AFFIRMED; LIMITED REMAND ORDERED.